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versy is between citizens of different States, and that a proceeding by habeas corpus is in no legal sense, a controversy between private parties.

11th. That the power of the several courts of the United States to inflict summary punishment for contempt of court in disobeying a writ of the court is expressly confined to cases of disobedience to lawful writs.

12th. That where it appears from the record that the conviction was for disobeying a writ of habeas corpus, which writ the court had no jurisdiction to issue, the conviction is *coram non judice* and void.[1]

Supreme Judicial Court of Massachusetts.—October Term, 1854.

CYNTHIA A. GREENE *vs.* ANDREW B. GREENE.[2]

A decree of divorce from the bonds of matrimony, although obtained by fraud, cannot be set aside on an original libel, filed at a subsequent term.

Libel for a divorce from the bonds of matrimony for five years' desertion of the libellant by the respondent. The libel also set forth, that the respondent, at the last November term of this court, by false testimony, fraudulently procured a divorce from the libellant for the alleged cause of adultery. "Wherefore, in addition to the prayer, which she now submits to this honorable court, to be divorced from said Andrew as the law provides, she prays that this honorable court will bear evidence of the fraud and collusion by means of which said libel of divorce of said Andrew was by him prosecuted, and the decree of divorce by him obtained against her, and that the same may be reversed, annulled and set aside, and all

[1] After the decision of the court in this case, Chief Justice Lewis, stated that each of the judges, who had concurred therein, would take a future opportunity of giving their reasons for the course which they had pursued. These opinions, as well as that of Judge Knox, which we are obliged to omit in the present number, for want of space, we hope to publish hereafter.

[2] To be published in 2 Gray's Reports.

such further proceedings may be had and ordered by this honorable court, as to justice and truth shall appertain."

E. L. Barney, for the libellant.
T. D. Robinson, for the respondent.

SHAW, C. J.—It will be perceived that this is an original libel, by wife against husband, alleging five years' desertion, and seeking on that ground a decree of divorce from the bond of matrimony. In this libel, and as subsidiary to it, probably for the purpose of anticipating and obviating a probable defence, and showing that the bond of matrimony still legally subsists, she sets forth a decree of *divorce à vinculo* for adultery, obtained by her husband at a former term, against her; she then avers, that the decree was obtained by fraud and false testimony, prays the court to hear evidence of the fraud and collusion by which the decree was obtained against her, that the same may be reversed, annulled and set aside, and that such proceedings may be had, &c. We can perceive no difference, between the case, where a libellant inserts such an allegation and prayer, in an original libel, by which she seeks a divorce *à vinculo* on another ground, and a case where such allegation and prayer are made the only subject of an original libel, to set aside a former decree. The object in both cases is to reverse and annul a subsisting decree.

In using the term "collusion," in the present case, we presume the libellant does not mean to use it in its ordinary sense, as collusion between the parties to the former proceeding, and so a fraud upon the law, because that would include herself as party to the fraud. As said by Willes, C. J., in *Prudam* vs. *Phillips*, reported in a note to Hargrave's Law Tracts, 456: "if both parties colluded in the cheat upon the court, it was never known that either of them could vacate the judgment."

We therefore understand this allegation as stating, that the husband "colluded," or combined, with other persons, to obtain false testimony, or otherwise to aid the husband in fraudulently obtaining a decree.

We are then to understand this libel as an allegation that the

former decree was obtained by the husband, by false testimony, and fraud practiced by him, and on that ground praying a reversal of a decree of divorce from the bond of matrimony, rendered by the same court, between the same parties, at a former term, which had terminated and closed.

Such a libel we think cannot be maintained. When the court has jurisdiction of the subject matter, and of the parties, where both parties are domiciled in Massachusetts, and the respondent actually appears and defends, or where it appears to the court, that the adverse party has been so legally summoned, as to be held legally in default if he does not appear, and a decree is passed, dissolving the bond of matrimony, and no appeal, exception, or other step taken to avoid the final judgment, we think it must in its nature be conclusive upon the parties. Whether such final decree is by our law open to any reversal, by review, writ of error, *certiorari*, or any other proceeding in the nature of an appeal, we give no opinion; no such question, we believe, has been judicially decided or raised. Nor does this opinion apply to any case, where the fact of the existence of the matrimonial relation between such parties, at any particular time, is drawn in question between other parties.

We do not take into view a consideration sometimes adverted to in English cases, which is, that the fact and legality of marriage and divorce, are in England exclusively cognizable in the ecclesiastical courts; we place our opinion upon the more general doctrine of *res judicata*, as settled in this commonwealth, and as applied to the case of divorce. We must inquire then, what would be the consequence of any other decision? A binding decree of divorce *à vinculo*, determines the *status* of the parties. If valid and effectual, the innocent party has a right to marry again. If the husband be the innocent party, his after marriage would be lawful, his wife would be entitled to dower and other rights of property, the children would be legitimate and entitled to inherit, and various other persons acquire or lose civil rights. If the decree is reversed, it must be for a cause that shows it ought not to have been rendered; the reversal relates back, and declares the decree void *ab initio*, and that the parties have never ceased to be husband and

wife. The husband would be exposed to a prosecution for polygamy,—we use this term rather than bigamy, because it is so used in the statute, Rev. St., c. 130, sect. 2,—which is a state prison offence; the wife has no right of property, in the real or personal estate of the husband, the offspring are illegitimate, and creditors and others may lose rights of action.

On such new hearing, the wife might bring new evidence to show that the evidence on which the former decree was rendered, was false; or she may hope to persuade another tribunal, court or jury, as the case may be, that the evidence formerly adduced, was not entitled to be believed, and so effect a reversal of the decree. And as there is no limitation of time, within which such new and original libel must be filed, it may be after a lapse of months or years.

But if a new and original libel may be brought, upon the ground that a former decree was obtained by false evidence, we see nothing to prevent the husband from bringing a third suit to reverse the decree of reversal on a suggestion and offer of proof, that the decree of reversal was obtained by perjury, subornation of perjury, and other fraud, and so reverse the second decree, and re-instate the original decree of divorce *à vinculo*.

Consequences are not always conclusive against a rule of positive law; but where it is a question of construction, either of a statute provision, or a rule of the common law, the consequences to which any particular construction or application would lead, have a strong bearing upon the question, what the legislature intended, or what is the just extent and qualification of the rule. To maintain an original libel in a case like this, would seem to be contrary to the fundamental principles of judicial action.

But we think the point here, is settled by authority, not specifically in regard to divorce, but generally as to the conclusive effect of a judgment, in a case arising afterwards, on the same matter, between the same parties. We take the rule to be, that a judgment of a court of competent jurisdiction, having jurisdiction of the subject and of the parties, by legal process duly served, and where no appeal, writ of error, *certiorari*, review or other legal process for revising, affirming, or reversing such judgment exists, or where

no such process is commenced by the party who would avoid the judgment, in the mode and within the time prescribed by law, it is conclusive upon the same parties in any other proceeding in law, in equity, or before any other judicial tribunal.

Instead of numerous citations of authorities, we refer to *Homer* vs. *Fish*, 1 Pick, 435, and the cases there cited. Some of the cases are certainly calculated to put the rule to a severe test; as that of *Peck* vs. *Woodbridge*, 3 Day, 36, where false testimony and forgery were alleged, to impeach the former judgment; but the rule was enforced, on the ground of its being necessary to the administration of justice. That when cases are once finally decided, that must be held to be the end of litigation between the same parties. The same rule is as steadily adhered to in chancery. In *Gelston* vs. *Codwise*, 1 Johns. 195, it is said by Chancellor Kent: "If a decree could be altered or varied by an original bill, a cause, as it has been frequently observed, would never be at rest, and there would be confusion and inconsistency in the decrees of the court."

It is no good exception to show, that the matter now offered did not in fact come in question; such an exception, as said by Parker, C. J., in *Homer* vs. *Fish*, would render the rule nugatory. It is sufficient, that the action was of a nature to admit of such a defence, and that the plaintiff, in the new writ, might have availed himself of it. 1 Pick. 441.

Most of the cases, supposed to have a contrary bearing, are those where the fact or the legality of a particular marriage has been drawn in question in a suit between third parties. The case of the *Duchess of Kingston*, most fully reported in 20 Howell's State Trials, 355, was an indictment for bigamy. The defence relied upon, was, that before her second marriage with the Duke of Kingston, her former supposed marriage was adjudged void in a jactitation case in the ecclesiastical court; and her counsel insisted that that decree was conclusive. The opinion of the judges was taken by the House of Lords, which was, that such decree in a court of competent jurisdiction, was conclusive between the parties, but not so in a suit between other parties, and that on an indictment it was competent for the crown to avoid the effect of the decree in ques-

tion, by proving that it was obtained by the collusion of both parties, and a fraud upon the court, and such evidence was therefore received, and the duchess was convicted.

The article cited as one of Mr. Hargrave's Law Tracts, 451, was an argument prepared with a view to the trial of that case. The opinion of the judges affirmed one of the opinions maintained by Mr. Hargrave in his treatise, and disaffirmed the other.

In the case already cited of *Prudam* vs. *Phillips*, Hargrave's Law Tracts, 456, note; Lord Ch. J. Willes, says that "whatever objections would avoid a judgment in a court of common law, would be sufficient to overturn a sentence in the spiritual court, but none others; that fraud was a matter of fact, and if used in obtaining judgment, was a deceit on the court and hurtful to strangers, who as they could not come in to reverse or set aside the judgment, must of necessity be admitted to aver it was fraudulent. But who ever knew a defendant plead, that a judgment obtained against him was fraudulent."

The maxim that fraud vitiates every proceeding, must be taken like other general maxims, to apply to cases where proof of fraud is admissible. But where the same matter has been either actually tried, or so in issue that it might have been tried, it is not again admissible; the party is estopped to set up such fraud, because the judgment is the highest evidence, and cannot be controverted. But a stranger may impeach a judgment which stands in his way, by plea and proof of fraud in obtaining it, because it is his only means of availing himself of the fraud.

There are several cases which have been supposed to have a bearing on this question, to which we will briefly refer. We have already noticed Hargrave's Law Tracts, and the case of the *Duchess of Kingston.*

The case of *Allen* vs. *Maclellan*, 12 Penn. St. R., 328, was an action of assumpsit, by an endorsee, on a note made payable to a woman, and endorsed by one professing to be her husband. It was contended by the promisor, that he was not the true husband, and certain decrees in matter of divorce were relied on. It was not, therefore, a case between the parties to either decree.

Colvin vs. *Colvin*, 2 Paige, 385, was a petition by both parties—after a decree for a divorce had been enrolled, but for aught that appears, at the same term, or at all events soon after—to open the enrolment and set aside the decree; the party originally charging adultery and claiming a divorce, stating his belief and conviction from facts since come to his knowledge, that the adultery charged had not been committed. The petition was granted, on the ground that the party though he had a right to a divorce, might waive that right, and that a condonation would take away the right, and restore the parties to marital relations. *Dunn* vs. *Dunn*, 4 Paige, 425, was a petition to set aside a decree of divorce entered on a bill taken *pro confesso*, on the ground that by service of an original subpœna, out of the jurisdiction of the court, in another state, the court did not acquire jurisdiction of the person of the respondent, and the decree on the face of the proceedings was erroneous. It proceeded on the ground that for want of legal service, and without an actual appearance, the court had no jurisdiction. And the chancellor says, "if the Court of Chancery has once acquired jurisdiction over the party, by the service of original process within the jurisdiction of the court, or by voluntary appearance, the decree or any order in the cause, may be served on the defendant out of the jurisdiction." And in another passage, he says "the vice chancellor was right in deciding, that the service of a subpœna, at Newark, (N. J.) was not sufficient to warrant the entry of an order to take the bill as confessed, for the want of appearance." The court, therefore, though they had jurisdiction of the subject, had not by legal process acquired jurisdiction of the person of the respondent.

We have seen no reliable authority opposed to the position above taken, that a decree of divorce *à vinculo*, where no appeal, review, or writ of error is allowed by law, or when the time for bringing such review or writ of error has expired, is final and conclusive upon the parties, and that an original proceeding to set it aside, on the ground that it was fraudulently obtained upon false evidence, cannot be maintained.

NOTE.—The facts of the case of Allen *vs.* Maclellan, 12 Penn. St. 328, referred to in the foregoing opinion, seem to have been somewhat misapprehended. The action there,

though in form upon a promissory note, was in fact brought to test the power of the Common Pleas of Philadelphia, to vacate, on the ground of fraud, a decree of divorce which it had granted at a previous term. This was the main question before the Supreme Court, and it was decided in the affirmative, in a very able opinion; the conclusions of which are, to some extent, adverse to those of Greene *vs.* Greene. Allen *vs.* Maclellan, is a strong case, for there, the party obtaining the divorce had subsequently married again, and had a child. We make this rectification, however, with the greatest respect for the learned court which decided the principal case, and without any intention of questioning the propriety of its decision.—*Eds. L. Reg.*

District Court, Hamilton County, Ohio—April, 1855.

ALFRED STUNT *vs.* THE STEAMBOAT OHIO.[1]

1. The provision of the Constitution of the United States expressly conferring appellate jurisdiction on the Supreme Court, does not authorize the exercise of appellate power by that tribunal, over the State courts, but extends simply to appeals from the subordinate federal courts.
2. There is no provision in the Constitution, from which a supervising power in the Supreme Court of the United States over the State courts, can be derived by way of *incident* or *implication.*
3. The Supreme Court of the United States has not been constituted the exclusive tribunal of last resort, to determine all controversies in relation to conflicts of authority between the federal government and the several States of the Union.
4. The State courts and the federal courts are *co-ordinate* tribunals, having concurrent jurisdiction in numerous cases, but neither having a supervising power over the other; and where the jurisdiction is concurrent, the decision of that court, or rather, of the courts of that judicial system in which the jurisdiction first attaches, is final and conclusive as to the parties.

MR. JUSTICE BARTLEY delivered the opinion of the Court:

This cause comes before us, at this time, on a motion to make an entry on our journals by an order of court, certifying that on the trial of the cause, the validity of a statute of the State of Ohio, under the authority of which the suit was prosecuted, was drawn in question, on the ground of its being repugnant to the constitution and laws of the United States; that the decision of this question

[1] Before Mr. Justice BARTLEY, of the Supreme Court, and Judges PARKER, CARTER and VAN HAMM, of the Common Pleas.